

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION**

PHILLIP NGHIEM,

Plaintiff,

v.

**DICK’S SPORTING GOODS, INC.,
ZETA INTERACTIVE
CORPORATION, and DOES 1–10,**

Defendants.

Case No.: SACV 16-00097-CJC(DFMx)

**ORDER DENYING DEFENDANTS’
MOTION TO DISMISS FOR LACK OF
STANDING**

I. INTRODUCTION

Plaintiff Phillip Nghiem brings this putative class action against Defendants Dick’s Sporting Goods, Inc. (“DSG”), and Zeta Interactive Corporation (“Zeta”) for violations of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. §§ 227 *et seq.* (See Dkt.

33 [First Amended Complaint, hereinafter “FAC”].) Before the Court is Defendants’ motion to dismiss for lack of standing. (Dkt. 68 [hereinafter “Mot.”].) For the following reasons, the motion is DENIED.

II. BACKGROUND

Nghiem is a plaintiffs’ attorney who handles consumer and debtor disputes, including TCPA claims. (Mot. at 9 (citing Dkt. 47-6 Ex. A [hereinafter “Nghiem Dep.”] at 20:03–07).) DSG operates sporting goods stores throughout the United States. (FAC ¶ 9.) DSG utilizes a marketing program centered on “mobile alerts”—text messages sent to subscribers. (*Id.* ¶ 18.) Defendant Zeta is a marketing company that operates the mobile alerts program for DSG. (*Id.*) Consumers can sign up for the mobile alerts program on DSG’s website or send a text message with the word “JOIN” to a number associated with DSG, called a “short code.” (*Id.* ¶ 19.)

According to the FAC, on or about February 20, 2015, Nghiem enrolled in DSG’s mobile alerts program by texting the word “JOIN” to DSG’s short code. (*Id.* ¶ 23.) Thereafter, on or about December 6, 2015, Nghiem texted the word “STOP” to that same short code, indicating that he no longer wished to receive mobile alerts from DSG. (*Id.* ¶ 24.) DSG sent Nghiem a text message indicating that he had unsubscribed and would no longer receive mobile alerts. (*Id.*)

Despite this confirmation, the FAC alleges that DSG continued to send Nghiem text messages on at least nine occasions between December 11, 2015, and January 22, 2016. (*Id.* ¶ 25.) Nghiem asserts that each of the nine messages was sent by an automatic telephone dialing system after Nghiem revoked his consent, in violation of the TCPA. (*Id.* ¶¶ 25–26.)

1 The FAC defines the class as “[a]ll persons in the United States and its territories
 2 who, within four years prior to the commencement of this litigation, were sent, using an
 3 automatic dialing system, any text messages by or on behalf of [DSG] to their cellular
 4 telephone and who did not consent to receive such messages.” (*Id.* ¶ 27.) The FAC
 5 alleges that, as a result of Defendants’ conduct, Nghiem and the rest of the class members
 6 “have had their privacy rights violated, have suffered actual and statutory damages, and,
 7 under 47 U.S.C. § 227(b)(3)(B), are each entitled to, among other things, a minimum of
 8 \$500.00 in damages for each of Defendants’ violations of the TCPA.” (*Id.* ¶ 38.) The
 9 FAC seeks statutory damages, treble damages, attorneys’ fees, and an order certifying a
 10 class. (*See id.* at 10.)

11
 12 On October 27, 2016, Defendants filed the instant motion, contending that Nghiem
 13 lacks standing to bring this action.¹ (Mot.)

14 15 **III. DISCUSSION**

16
 17 Defendants argue that Nghiem does not have standing to bring this action in light
 18 of the Supreme Court’s recent opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016),
 19 *as revised* (May 24, 2016), because Nghiem has not alleged a concrete and particularized
 20 injury in fact as required by Article III of the Constitution. (Mot. at 3–8.) In the
 21 alternative, they argue that Nghiem does not have prudential standing. (*Id.* at 9.) The
 22 Court considers each argument in turn.

23
 24 ¹ Although Defendants style their motion as a motion to dismiss, they cite the legal standard for a
 25 motion for judgment on the pleadings, (Mot. at 3), and Nghiem treats Defendants’ motion as a motion
 26 for judgment on the pleadings, (Dkt. 75 [Opposition, hereinafter “Opp.”]). This is likely because
 27 Defendants have already filed an answer to the Complaint. (Dkt. 59). However, there is no deadline to
 28 file a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. “Indeed, ‘[t]he objection
 that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its
 own initiative, at any stage in the litigation, even after trial and the entry of judgment.’” *Wood v. City of*
San Diego, 678 F.3d 1075, 1082 (9th Cir. 2012) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506
 (2006)).

1 **A. Article III Standing**

2
3 To establish Article III standing, a plaintiff must have “(1) suffered an injury in
4 fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is
5 likely to be redressed by a favorable judicial decision.” *Spokeo*, 136 S. Ct. at 1547 (citing
6 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). With regard to the first element,
7 “[t]o establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of
8 a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent,
9 not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560).

10
11 The parties fundamentally disagree on the scope of *Spokeo*—particularly as it
12 applies to TCPA cases. In *Spokeo*, the plaintiff brought a class action lawsuit against the
13 operator of a “people search engine” for violations of the Fair Credit Reporting Act
14 (“FCRA”), 15 U.S.C. §§ 1681 *et seq.*, upon discovering that the information the
15 defendant had gathered and disseminated online about the plaintiff was incorrect.
16 *Spokeo*, 136 S. Ct. at 1544. The FCRA “imposes a host of requirements concerning the
17 creation and use of consumer reports,” including the requirement that consumer reporting
18 agencies “follow reasonable procedures to assure maximum possible accuracy of”
19 consumer reports. *Id.* at 1545 (citing 15 U.S.C. § 1681e(b)). Both actual and statutory
20 damages are available for FCRA violations. *Id.* (citing 15 U.S.C. § 1681n(a)). The Ninth
21 Circuit had reversed the district court ruling that the plaintiff lacked standing and held
22 that the plaintiff alleged adequate injury in fact, based on allegations that the defendant
23 had violated *his* statutory rights, and that his personal interest in the handling of his credit
24 information was sufficiently particularized. *Id.* at 1545.

25
26 The Supreme Court vacated the decision and remanded it to the Ninth Circuit
27 because it had not considered *both* aspects of the injury in fact analysis: whether the
28 injury was concrete *and* particularized. (*Id.*) The Supreme Court went on to explain that

1 in some instances “Congress may ‘elevat[e] to the status of legally cognizable injuries
2 concrete, *de facto* injuries that were previously inadequate in law.’” *Id.* at 1549 (quoting
3 *Lujan*, 504 U.S. at 578). However, “Article III standing requires a *concrete* injury even
4 in the context of a statutory violation. For that reason, [the plaintiff] could not, for
5 example, allege a bare procedural violation, divorced from any concrete harm, and satisfy
6 the injury-in-fact requirement of Article III.” *Id.* (emphasis added). On the other hand,
7 “the violation of a procedural right granted by statute can be sufficient in some
8 circumstances to constitute injury in fact. In other words, a plaintiff in such a case need
9 not allege any additional harm beyond the one Congress has identified.” *Id.* Finally, the
10 Court noted that “[a] violation of one of the FCRA’s procedural requirements may result
11 in no harm . . . not all inaccuracies cause harm or present any material risk of harm. An
12 example that comes readily to mind is an incorrect zip code. It is difficult to imagine
13 how the dissemination of an incorrect zip code, without more, could work any concrete
14 harm.” *Id.* at 1550.

15
16 Here, Defendants argue that Nghiem lacks standing because he has alleged only
17 the “bare allegations of ‘actual damages’ and a ‘privacy violation,’ but fails to identify
18 any impacts from the alleged TCPA violation.” (Mot. at 1.) The Court disagrees that
19 Nghiem’s allegations are insufficient. In contrast with a FCRA violation, which “*may*
20 result in no harm,” *Spokeo*, 136 S. Ct. at 1550, a TCPA violation entails inherent harms
21 sufficient to establish injury in fact. The TCPA codified a remedy for injuries that
22 *already existed* in order to curb the problem of unwanted telemarketing calls. In
23 determining that the TCPA encompasses text messages as well as telephone calls, the
24 Ninth Circuit described the purpose of the TCPA as follows:

25
26 The TCPA was enacted to “protect the privacy interests of
27 residential telephone subscribers by placing restrictions on
28 unsolicited, automated telephone calls to the home and to
facilitate interstate commerce by restricting certain uses of
facsimile machines and automatic dialers.” S. Rep. No. 102-

178, at 1 (1991), reprinted in 1991 U.S.C.C.A.N. 1968. The TCPA was enacted in response to an increasing number of consumer complaints arising from the increased number of telemarketing calls. *See id.* at 2. The consumers complained that such calls are a “nuisance and an invasion of privacy.” *See id.* The purpose and history of the TCPA indicate that Congress was trying to prohibit the use of ATDSs to communicate with others by telephone in a manner that would be an invasion of privacy.

Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 954 (9th Cir. 2009). Thus, “[u]nlike the statute at issue in *Spokeo* . . . the TCPA section at issue does not require the adoption of procedures to decrease *congressionally-identified* risks. . . . It directly forbids activities that *by their nature* infringe the privacy-related interests that Congress sought to protect by enacting the TCPA. . . . In any event, section 227 establishes substantive, not procedural, rights to be free from telemarketing calls consumers have not consented to receive.” *A.D. v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 4417077, at *6–7 (N.D. Ill. Aug. 19, 2016) (emphasis added). For this reason, “other district courts have similarly distinguished statutory violations of the TCPA from statutory violations of the FCRA in the wake of the Court’s *Spokeo* decision.” *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-CV-01109-JST, 2016 WL 5791411, at *5 (N.D. Cal. Sept. 1, 2016) (citing *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016) (noting that the concern in *Spokeo* about a “‘bare procedural violation, divorced from any concrete harm’ . . . has little application to claims under the TCPA, since those claims are not based on ‘bare procedural’ rights, but rather on substantive prohibitions of actions directed toward specific consumers.”)).

Unlike FCRA violations, TCPA violations necessarily cause harm to consumers. For example, *Cabiness* explained that “[e]very unconsented call through the use of an [Automatic Telephone Dialing System] to a consumer’s cellular phone results in actual harm: the recipient wastes her time and incurs charges for the call if she answers the

1 phone, and her cell phone's battery is depleted even if she does not answer the phone."
 2 *Cabiness*, 2016 WL 5791411, at *5. "In addition to these tangible harms, unsolicited
 3 calls also cause intangible harm by annoying the consumer." *Id.* Although the *Cabiness*
 4 decision was limited because the plaintiff had alleged *additional* harms such as "stress
 5 and anxiety," *see id.*, the Court finds the *Cabiness* reasoning instructive here.

6
 7 Defendants rely on a few district court cases decided after *Spokeo* which assert that
 8 a TCPA violation on its own is not sufficient to constitute injury in fact. (Mot. at 4–8
 9 (citing *Romero v. Dep't Stores Nat'l Bank*, No. 15-CV-193-CAB-MDD, 2016 WL
 10 4184099 (S.D. Cal. Aug. 5, 2016); *Sartin v. EKF Diagnostics, Inc.*, No. CV 16-1816,
 11 2016 WL 3598297 (E.D. La. July 5, 2016); *Smith v. Aitima Med. Equip., Inc.*, No.
 12 EDCV1600339ABDTBX, 2016 WL 4618780 (C.D. Cal. July 29, 2016)).) In *Romero*,
 13 the plaintiff alleged that the defendant called her 290 times using an automated telephone
 14 dialing system over the course of six months. *Romero*, 2016 WL 4184099, at *1.
 15 *Romero* found that the plaintiff had not met her burden of establishing standing under
 16 *Spokeo* because the fact "[t]hat Defendants called Plaintiff's cell phone may satisfy the
 17 'particular' component, but it does not automatically satisfy the requirement that the
 18 injury be 'concrete.'" *Id.* at *3. The *Romero* court reasoned that a TCPA violation did
 19 not necessarily confer standing because "it is possible that the recipient's phone was not
 20 turned on or did not ring, that the recipient did not hear the phone ring, or the recipient
 21 for whatever reason was unaware that the call occurred." *Id.* The other cases on which
 22 Defendants rely decided that the plaintiffs lacked standing for similar reasons. *See Sartin*
 23 *v. EKF Diagnostics, Inc.*, No. CV 16-1816, 2016 WL 3598297, at *3 (E.D. La. July 5,
 24 2016) ("Although Dr. Sartin has plausibly alleged that defendants violated the TCPA by
 25 sending unsolicited fax advertisements, he fails to plead facts demonstrating how this
 26 statutory violation caused him concrete harm."); *Smith v. Aitima Med. Equip., Inc.*, No.
 27 EDCV1600339ABDTBX, 2016 WL 4618780, at *4 (C.D. Cal. July 29, 2016) ("Any
 28 depletion of Plaintiff's battery, or aggravation and nuisance, resulting from only one call,

1 is a de minimis injury . . . [which] is not sufficient to confer standing.”).

2
3 In light of the specific purpose and history of the TCPA, the Court agrees with
4 those federal courts that have criticized the *Romero* line of cases. *See, e.g., LaVigne v.*
5 *First Cmty. Bancshares, Inc.*, No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992, at *6
6 (D.N.M. Oct. 19, 2016) (“Defendants have also offered *Romero* [to support lack of TCPA
7 standing], which is hardly convincing. Under its rather draconian analysis, a plaintiff
8 would find it almost impossible to allege a harm as a result of these robocalls. Worse, the
9 case ignores the existence of intangible harms that have been recognized in the legislative
10 history and in the case law. The Court agrees with plaintiff that *Romero* is an outlier in
11 holding that a violation of the TCPA is a bare procedural violation and that some
12 additional harm must be shown to establish standing.”); *A.D.*, 2016 WL 4417077, at *7
13 (“The Court respectfully disagrees with the reasoning of the judge in *Sartin*. In contrast
14 to statutes that impose obligations regarding how one manages data, keeps records, or
15 verifies information, section 227 of the TCPA directly prohibits a person from taking
16 actions directed at consumers who will be touched by that person’s conduct. It does not
17 matter whether a plaintiff lacks additional tangible harms like wasted time, actual
18 annoyance, and financial losses. Congress has identified that unsolicited telephonic
19 contact constitutes an intangible, concrete harm, and A.D. has alleged such concrete
20 harms that she herself suffered. It would be redundant to require a plaintiff to allege that
21 her privacy and solitude were breached by a defendant’s violation of section 227, because
22 Congress has provided legislatively that a violation of section 227 is an invasion of the
23 call recipient’s privacy.”)

24
25 In this case, Nghiem alleges a concrete and particularized injury by laying out the
26 elements of a TCPA violation. Additionally, Nghiem alleges that his privacy was
27 invaded when he received text messages from DSG after opting out of its mobile alerts
28 program. (FAC ¶¶ 35, 38.) This is precisely the type of harm that the TCPA was enacted

to prevent. *Satterfield*, 569 F.3d at 954; *see, e.g., Holderread v. Ford Motor Credit Co., LLC*, No. 4:16- cv-00222, 2016 WL 6248707, at *2 (E.D. Tex. Oct. 26, 2016) (“The harm caused by unwanted phone calls is closely related to an invasion of privacy, which is a widely recognized common law tort. . . . Congress identified the intangible harm of invasion of privacy as legally cognizable. Considering this history and Congress’s judgment, the Court finds an invasion of privacy within the context of the TCPA constitutes a concrete harm that meets the injury-in-fact requirements.”); *Griffith v. ContextMedia, Inc.*, No. 16-C-2900, 2016 WL 6092634, at *1–2 (N.D. Ill. Oct. 19, 2016) (“The complaint also alleges that plaintiff ‘lost time reading, tending to and responding to’ the unsolicited communications, and that the texts *invaded her privacy*. Courts in this district have held, both before and after the Court’s decision in *Spokeo*, . . . that loss of time and privacy are concrete injuries for the purpose of conferring Article III standing.”) (emphasis added); *Hewlett v. Consolidated World Travel, Inc.*, No. 16-713 WBS, 2016 WL 4466536, at *2 (E.D. Cal. Aug. 23, 2016) (“Courts have consistently held that allegations of nuisance and *invasion of privacy* in TCPA actions are sufficient to state a concrete injury under Article III.”) (emphasis added); *Krakauer v. Dish Network L.L.C.*, No. 14-cv-333, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) (TCPA violations “are more than bare procedural violations; here, Satellite Systems Network, Dish’s alleged agent, actually called the class members’ numbers. These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying *invasion of privacy*. . . . While class members did not necessarily pick up or hear ringing every call at issue in this case, each call created, at a minimum, a *risk of an invasion of a class member’s privacy*. *Spokeo* clarified that a ‘risk of real harm’ was enough to show concrete injury.”) (emphasis added); *Caudill v. Wells Fargo Home Mortgage, Inc.*, No. 16-cv-066, 2016 WL 3820195, at *2 (E.D. Ky. Jul. 11, 2016) (“These alleged harms, such as *invasion of privacy*, have traditionally been regarded as providing a basis for a lawsuit in the United States. . . . Further, when Congress established the TCPA in 1991, it did so to protect consumers from the ‘nuisance, invasion of privacy, cost, and

1 inconvenience that autodialed and prerecorded calls generate.’ . . . Based on *Spokeo*, the
 2 Court is satisfied that Caudill has alleged an injury-in-fact that is concrete and
 3 particularized.”) (emphasis added). Accordingly, Nghiem has standing to bring this
 4 action.

6 **B. “Zone of Interests”**

8 Defendants also argue that Nghiem lacks prudential standing because his interests
 9 are not within the “zone of interests” that the TCPA was intended to protect. (Mot. at 9.)
 10 Defendants maintain that Nghiem “gratuitously tried to create the circumstances for a
 11 TCPA violation so that he could bring a class action” by signing up for multiple text
 12 message alert programs, all close in time, and all within the “same timeframe he was
 13 filing TCPA class actions and sending TCPA demand letters to on behalf of his clients.”
 14 (*Id.*) For example, they note that Nghiem’s law firm sent DSG and its subsidiary demand
 15 letters on behalf of clients complaining of TCPA violations resulting from DSG’s mobile
 16 alerts program around the same time that Nghiem signed up for the mobile alerts
 17 program. (*See id.*)

19 In *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387
 20 (2014), the Supreme Court recently “rejected the ‘prudential standing’ label and made
 21 clear that whether a plaintiff’s claims are within a statute’s zone of interests is not a
 22 jurisdictional question.” *Pit River Tribe v. Bureau of Land Mgmt.*, 793 F.3d 1147, 1156
 23 (9th Cir. 2015) (citing *Lexmark*, 134 S. Ct. at 1387). Rather, “whether a plaintiff comes
 24 within ‘the zone of interests’ is an issue that requires us to determine, using traditional
 25 tools of statutory interpretation, whether a legislatively conferred cause of action
 26 encompasses a particular plaintiff’s claim. . . . As Judge Silberman of the D.C. Circuit
 27 recently observed, ‘prudential standing is a misnomer’ as applied to the zone-of-interests
 28 analysis, which asks whether ‘this particular class of persons ha[s] a right to sue under

1 this substantive statute.’’ *Lexmark*, 134 S. Ct. at 1387 (quoting *Association of Battery*
2 *Recyclers, Inc. v. EPA*, 716 F.3d 667, 675–76 (D.C. Cir. 2013) (Silberman, J.,
3 concurring)).

4
5 Defendants’ “zone of interests” argument relies on extrinsic evidence regarding
6 Nghiem’s character and motivation for filing and litigating this action. (Mot. at 9.) The
7 allegations of Nghiem’s Complaint, however, unsurprisingly suggest nothing nefarious
8 on his part, (*see generally* FAC), and Nghiem contests Defendants’ proffered evidence
9 and factual conclusions, (Opp. at 17–19). Thus, the statutory question of the TCPA’s
10 “zone of interests” involves disputed issues of material fact that cannot be resolved by the
11 Court at this early stage of the case. *See Rosales v. United States*, 824 F.2d 799, 803 (9th
12 Cir. 1987) (“A district court may hear evidence and make findings of fact necessary to
13 rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are
14 not intertwined with the merits. In such circumstances, no presumption of truthfulness
15 attaches to the plaintiff’s allegations. However, if the jurisdictional issue and substantive
16 claims are so intertwined that resolution of the jurisdictional question is dependent on
17 factual issues going to the merits, the district court should employ the standard applicable
18 to a motion for summary judgment and grant the motion to dismiss for lack of
19 jurisdiction only if the material jurisdictional facts are not in dispute and the moving
20 party is entitled to prevail as a matter of law. Otherwise, the intertwined jurisdictional
21 facts must be resolved at trial by the trier of fact.” (internal citations omitted)). What
22 matters at this early stage are the allegations of Nghiem’s Complaint, and those
23 allegations explicitly state that Nghiem opted out of DSG’s mobile alerts program and yet
24 continued to receive text messages from DSG that violated his privacy. (FAC ¶¶ 23–25.)
25 This is all that is necessary for Nghiem to defeat Defendants’ motion.

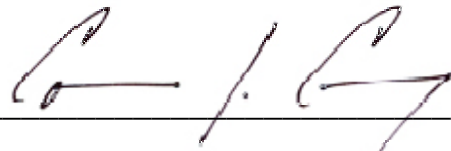
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1 **IV. CONCLUSION**

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3 For the foregoing reasons, Defendants' motion to dismiss for lack of standing is
4 **DENIED.**

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7 **DATED: December 1, 2016**

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9 **CORMAC J. CARNEY**
10 **UNITED STATES DISTRICT JUDGE**
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